

**COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND**

Inverness Forest Association Inc.,

Complainant

v.

Jack R. Salamanca,

Respondent

Case #17-08

Panel Hearing Date:

December 17, 2008

Decision issued:

February 25, 2009

MEMORANDUM DECISION AND ORDER

Inverness Forest Association Inc. (“Complainant” or the “Association”) filed a dispute with the Commission on Common Ownership Communities on March 12, 2008, alleging that Jack R. Salamanca (“Respondent”) was in violation of Article V of the covenants of Inverness Forest Association by virtue of his failure to seek and the obtain prior written approval of the Association before installing a new roof on his home at 10843 Deborah Drive in Potomac, Maryland. The newly installed roof was composed of a material other than split cedar shake shingles, the only material specified in Section 16 of the Architectural Control Resolution adopted by the Board of Directors in 2001, and thereafter amended from time to time. Complainant specifically alleged that the Respondent was placed on written and oral notice of the requirement to apply for approval of a roof other than cedar shakes.

The Complaint was filed March 12, 2008. Commission staff sent a copy of the Complaint to Respondent, who filed a timely response. On August 6, 2008, the Commission accepted jurisdiction pursuant to Montgomery County Code Section 10B-8(3)(A)(i). Notification to both parties was issued August 7, 2008.

A hearing was held on December 17, 2008 before a Commission on Common Ownership Communities hearing panel comprised of Commissioners Kevin Gannon and Allan Farrar, and Greg S. Friedman, Panel Chairman.

Findings of Fact

Complainant Inverness Forest Association Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act and Chapter 10B of

the Montgomery County Code. Inverness Forest, sometimes known as Inverness Village, is a common ownership regime comprised of 304 town houses established in accordance with the requirements of the Annotated Code of Maryland, by Willeburn-Inverness Inc., the Declarant, in a Declaration of Covenants, Conditions and Restrictions filed in Liber 3949 at folio 181, among the Land Records of Montgomery County, Maryland, and thereafter supplemented by subsequent Declarations as the Declarant annexed additional parcels of land to the land described in the initial Declaration. Respondent is owner of an interior town house unit in Inverness Forest.

Complainant enforces covenants recorded among the Land Records of Montgomery County, as well as rules and regulations for the Inverness Forest community. The Association adopted an Architectural Control Resolution in October 2001 (the “ACR”), as amended from time to time thereafter. Changes or modifications to homes in the Inverness regime require an application to the Architectural Control Committee (“ACC”) appointed by the Association Board of Directors, and approval by the ACC. The ACR specifies, at Article 16, that roofs be constructed of “hand split cedar shake material”; but includes language providing for the possibility of “a decision on alternative roofing.” There are no standards specified for such alternative roofing. The ACR includes a form Application for Architectural Change. A more recent form appears on the Association website.

By letter to Respondent dated September 15, 2007, the Association’s ACC expressed concern that Respondent intended to replace the original cedar shake roof on his town house “with a material other than cedar shakes” prior to submitting an application to the ACC for approval of an alteration from the original construction materials. The letter expressly noted, “...after the Special Meeting of December 2, 2004, the Board stopped allowing alternate materials as an acceptable replacement for our cedar shake roofs.” Evidence adduced at hearing demonstrated that prior to issuance of such notice, Respondent had purchased *Enviroshake* synthetic shake roofing manufactured by Wellington Polymer Technology Inc., and that an officer of the Association and a member of the ACC had seen the product in front of Respondent’s home and cautioned Respondent’s adult son against installing the synthetic roofing prior to submitting application to the ACC. After receipt of the letter, Respondent proceeded to install the new roof using the synthetic product. On December 16, 2008, Respondent submitted an informal application “for retroactive approval of the replacement of the cedar shake roof shingles with Enviroshake...”; however, Respondent had yet to file his request on the Association’s specified application form.

In response to questions from the Panel, the Complainant testified that the cedar shake roofs on many Association members’ homes had deteriorated and become discolored in various shades of green and brown, and further that a number of Inverness homes had installed replacement roofs composed of synthetic shingles after applying for and receiving ACC approval. No such approvals have been granted subsequent to the decision rendered at the Special Meeting held December 2, 2004; nor has the Association considered evaluating any synthetic shakes in order to designate a pre-approved acceptable alternative to genuine cedar shake shingles.

The parties introduced specimens of Enviroshake and genuine cedar shakes. The Panel found the appearance of the two products to be similar; however, the synthetic product was considerably heavier and more substantial. Respondent introduced uncontroverted expert testimony that the synthetic product would maintain its appearance virtually indefinitely, and a useful life considerably greater than cedar shake, as well as a 50-year manufacturer's product warranty. Cedar shake roofs have a Class C fire retardant rating, although may be chemically treated to improve the rating to a Class B rating. Although the Enviroshake engineered roofing product may be purchased in a Class A variant, Respondent chose the standard Class C formulation in order to achieve some cost savings. Both versions are more expensive than genuine cedar shakes. We take judicial notice of the fact that even though a synthetic roof composition may have a fire retardant rating that is the same as a wood product, the synthetic product is less likely to cause burning embers to "jump" from one roof to that of another owner's nearby structure.

Section 22-98 of the Montgomery County Code provides:

- (a) *"A person must not make or enforce any deed restriction, covenant, rule, or regulation, or take any other action, that would require the owner of any building to install any roof material that does not have a class A rating, or an equivalent rating that indicates the highest level of fire protection, issued by a nationally recognized independent testing association.*
- (b) *"As used in this section:*
 - (1) *A **person** includes a homeowners association as defined in Section 24B-1.*
 - (2) ***The owner of any building** includes a unit owner in a condominium, a lot owner in a homeowners association, and a shareholder in a cooperative housing corporation.*
- (c) *This section applies to all deed restrictions, covenants, rules and regulations adopted before and after this section became law [March 9, 1989]."* (1989 L.M.C., ch. 23, Section 1)

Complainant's designee at the hearing suggested the possibility of incorporating a cedar shake roof in a Class A roof **system**. In order for a cedar shake roof to qualify for a Class A fire rating, one must install a Class B product over a fireproof cap sheet which is affixed to the plywood sub roof.. In other words, the roof system achieves a Class A rating only by combining it with another material which qualifies for such rating.

Conclusions of Law

The legal principles applicable to this case are found in *Kirkley v. Seipelt*, 212 Md.127, 128 A.2d 430 (1957) and *Markey v. Wolf*, 92 Md. App. 137, 607 A2d 82 (1992). *Kirkley* held that covenants that establish a general development plan for a neighborhood with the intention of regulating the construction of dwellings so as to create an attractive, desirable community are enforceable in equity, even though no specific standards may be set out in the covenants themselves; provided, however, that the approval or disapproval of alterations or modifications are reasonable and performed in good faith. Such covenants must also comply with applicable law. As the cedar shake material itself can never be rated Class A, we follow the Commission decision in *Fishbein v. Avenel Community Association Inc.*, Case No. 744-0, that Montgomery County Code Section 22-98 strictly prohibits an association from requiring its members to use cedar shakes as the sole acceptable roofing in the community. We further find that the Enviroshake roofing product closely mimics the appearance of actual cedar shakes and appears to be a suitable alternative to cedar shake roofing.

However, Complainant clearly has the authority to disapprove proposed alterations which will impair the overall attractiveness of the Inverness community, as well as to establish procedures for application for approval of proposed alterations. We find that Respondent failed to abide by the Association's reasonable requirements for application for approval for his desired modification from the Inverness norm. However, we acknowledge that the installation of a new roof is not always a prophylactic act and at times may be an emergency requiring immediate action to protect the structure and contents of one's home, thereby making it difficult to await the customary period for a decision upon a homeowner's application for association or ACC approval.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, we ORDER as follows:

1. Respondent must submit a retroactive application for approval of the installation of an Enviroshake replacement roof within 20 days from the date of this decision.. If the Association customarily has assessed fines to other unit owners in past situations in which an owner constructed an alteration without obtaining prior ACC approval, then the Association may assess such customary fine against Respondent; provided, however, that such fine may not exceed \$150.
2. Complainant must fully and completely consider Respondent's application. In rendering its decision upon Respondent's application, the Association must fully and fairly evaluate the acceptability of Enviroshake as a suitable alternative to cedar shakes and must weigh the relative benefit (if any) to the Association of denial of Respondent's application against the fairness, expense, practicality; and environmental impact, of removal of the roof and installation of an alternate synthetic product.

3. Within 120 days from the date of this decision, the Association must amend Article 16 of its Architectural Control Resolution so as to identify one or more acceptable alternatives to cedar shake roofing; and must publish its decision on its website or elsewhere so that the entire community shall be made aware of the Association's approved roof products.

Commissioners Farrar and Gannon concur in this Decision and Order.

The Panel retains jurisdiction over this matter pending final resolution of this dispute and compliance by the parties with the foregoing rulings.

By: _____
Greg Friedman, Panel Chair

Date: _____